85-662

No._____

Supreme Court, U.S.
FILED
OCT 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF TEXAS,

Petitioner.

vs.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

NANCY N. LYNCH
Assistant Attorney General
Chief, Environmental
Protection Division

RENEA HICKS*
Assistant Attorney General

P.O. Box 12548
Austin, Texas 78711
(512) 475-1101

Attorneys for Petitioner

*Counsel of Record

October 1985

QUESTION PRESENTED

Is the Secretary of Energy's final determination under Section 116(a) of the Nuclear Waste Policy Act of 1982, identifying two nine-square-mile sites of Texas farmland and thereby subjecting them to investigation by the Department of Energy for the nation's first high-level radioactive waste repository, a final action judicially reviewable under Section 119(a)(1)(A)-(C) of the Act?*

---

* The parties in the court below were: State of Texas, petitioner; Delbert L. Devin, Wayne and Evelyn Richardson, Wylie A. Byrd, Mike Richardson, Donald Richardson, Glynn Burrell, Bryce Cook, W.A. Carter, James and Geraldine Fangman, Anthony and Catherine Paschel, R.D. and Mildred Hicks, Dorothy Fields, J. Morris Carter, F. Jean Carter, Tonya Kleuskens, Swisher County Nuclear Development Rights Trust, STAND, Inc., and POWER, Inc., private petitioners; and United States Department of Energy and Donald Paul Hodel, Secretary of Energy (succeeded in office by John S. Herrington), respondents.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT:

I. The Determination of What Constitutes a Final Decision or Action under Section 119(a)(1)(A)-(C) of the Act Is an Important Question in the Administration of the High-level Waste Program Upon Which This Court's Guidance Is Needed 7

II. The Fifth Circuit's Resolution of the Finality and Ripeness Issues Conflicts with Administrative Law Principles Established by This Court's Decisions 10

CONCLUSION 13

APPENDIX A A-1

APPENDIX B B-1

TABLE OF AUTHORITIES

Cases:	Page
Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)	8
Bell v. New Jersey, 461 U.S. 773 (1983)	12
Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980)	11,12
Lindahl v. Office of Personnel Management, 105 S.Ct. 1620 (1985)	8
Mathews v. Eldridge, 424 U.S. 319 (1976)	12
Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission, 539 F.2d 824 (2d Cir. 1976)	11
Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983)	10
Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic, 400 U.S. 62 (1970)	11
Texas v. Department of Energy, 764 F.2d 278 (5th Cir. 1985)	*passim*
Thomas v. Union Carbide Agricultural Products Co., 105 S.Ct. 3325 (1985)	13
Washington v. Department of Energy, No. 85-7128 (9th Cir. filed March 8, 1985)	9
Western Oil and Gas Association v. Environmental Protection Agency, 633 F.2d 803 (9th Cir. 1980)	12

TABLE OF AUTHORITIES, *continued*

Page

Statutes and regulations:

28 U.S.C. § 1254(1) 1
42 U.S.C. § 10101 *et seq.* ..... *passim*
49 Fed. Reg. 47,714 *et seq.* (1984) 5,9,11

Other materials:

SCI., Oct. 11, 1985 7

Wright, Miller, Cooper, & Gressman, *Federal Practice & Procedure: Jurisdiction*, vol. 16 (1977) 12

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF TEXAS,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*,

Respondents.

Petition for a Writ of Certiorari

The State of Texas ("Texas") petitions the Court to issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

A panel of the court below issued an opinion-order granting the motion to dismiss filed by the United States Department of Energy ("DOE") and the Secretary of Energy ("Secretary"). It is reported at 764 F.2d 278 and reproduced as Appendix A. The court below denied rehearing and rehearing en banc. This denial is reported at 770 F.2d 164 and reproduced as Appendix B.

JURISDICTION

The opinion ordering dismissal was entered on June 19, 1985. The denial of rehearing and rehearing en banc was entered on July 31, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved in this case is the Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101-10226 (1982) ("NWPA" or "the Act"). The provisions of the Act most pertinent to the matters raised in this petition follow.

NWPA § 116(a), 42 U.S.C. § 10136(a):

> The Secretary shall identify the States with one or more potentially acceptable sites for a repository within 90 days after January 7, 1983. Within 90 days of such identification, the Secretary shall notify the Governor, the State legislature, and the tribal council of any affected Indian tribe in any State of the potentially acceptable sites within such State. For the purposes of this subchapter, the term "potentially acceptable site" means any site at which, after geologic studies and field mapping but before detailed geologic data gathering, the Department undertakes preliminary drilling and geophysical testing for the definition of site location.

NWPA § 119(a)(1), 42 U.S.C. § 10139(a)(1):

> Except for review in the Supreme Court of the United States, the United States Courts of Appeals shall have original and exclusive jurisdiction over any civil action—
>
> (A) for review of any final decision or action of the Secretary, the President, or the Commission under this part;
>
> (B) alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part;
>
> (C) challenging the constitutionality of any decision made, or action taken, under any provision of this part;

(D) for review of any environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) with respect to any action under this subtitle, or as required under section 10155(c)(1) of this title, or alleging a failure to prepare such statement with respect to any such action;

E) for review of any environmental assessment prepared under section 10132(b)(1) or 10155(c)(2) of this title; or

(F) for review of any research and development activity under subchapter II of this chapter.

STATEMENT OF THE CASE

Background: The High-Level Radioactive Waste Program

High-level radioactive waste ("high-level waste") includes spent nuclear fuel and other forms of highly radioactive waste. It is very dangerous and very long-lived. In the 1950's, the federal government, essentially unimpeded by legislative directives, began a geographical screening process of sorts to find a permanent disposal site for this material. Finally, in an effort to establish a workable method for resolving what it termed the "national problem" created by the accumulation of high-level waste, Congress enacted the Nuclear Waste Policy Act of 1982. The Act explicitly found that federal efforts during the past thirty years to solve the high-level waste problem had been inadequate, NWPA § 111(a)(3), 42 U.S.C. § 10131(a)(3), and that state and public participation in the repository program was essential, NWPA § 111(a)(6), 42 U.S.C. § 10131(a)(6).

The Act establishes a detailed framework and a step-by-step schedule for implementing the Congressionally-chosen solution to the problem: an environmentally-safe mined geologic repository for the permanent disposal of high-level waste. Under the NWPA schedule, with which DOE is not always in phase, the first repository would be operative in 1998, approximately fifteen years from the Act's passage. The Act also contemplates the need for a second repository, NWPA § 112(b)(1)(C),

42 U.S.C. § 10132(b)(1)(C), and DOE has initiated preliminary site screening activities for it.

The Fifth Circuit outlined the principal statutory steps in the carefully segmented program for selecting the first repository:

> The NWPA...requires the Secretary to identify states containing "potentially acceptable sites" ...within 90 days of [January 7, 1983]. Within 90 days of identification, the Secretary must notify the governors and legislatures of such states of the location of such potentially acceptable sites. During this same 180 day period, the Secretary is to promulgate general guidelines for the recommendation of sites for repositories. ...
>
> Once the guidelines are promulgated, the Secretary is to use them to determine which of the sites designated by him are suitable for "site characterization"—i.e. further intensive testing—and he is to nominate five sites as suitable for site characterization. This nomination must be preceded by public comment and hearings and must be accompanied by an "environmental assessment." This environmental assessment is a comprehensive document that discusses the suitability of the nominated site for characterization and development as a repository and compares its suitability with the other four nominated sites. ...
>
> From these five nominated sites the Secretary is to recommend three sites to the President for site characterization, and the President must review and approve this recommendation. Following site characterization, the President is to recommend one of the three sites to Congress for development as the first repository. An affected state or Indian tribe may submit to Congress a notice of disapproval of the President's recommendation; and this veto prohibits the President's recommendation from becoming effective unless both houses of Congress override it by passing a resolution of repository siting approval within 90 days.

Texas v. DOE, 764 F.2d at 280-81 (statutory citations and footnotes omitted). After obtaining Congressional approval of the chosen repository site, DOE must obtain an operating license from the Nuclear Regulatory Commission. Only then, when Section 119's judicial review provisions become inoperative, NWPA § 125, 42 U.S.C. § 10145, can DOE begin actual emplacement of the high-level waste.

DOE Actions Concerning Texas

The issue in this case arises from the crucial first statutory step in the fifteen year program, a step DOE itself treats as a "principal decision point," *see* DOE Mission Plan, vol. II, at 122 (June 1985). Under Section 116(a) of the Act, DOE had 180 days to identify the states containing potentially acceptable sites for the first repository and to notify specified officials of the specific potentially acceptable sites in their states. Within this period, DOE had identified six states with potentially acceptable sites and notified all of them except Texas of the exact location of those sites in their states.[1]

In Texas, when Section 116(a)'s deadline arrived, DOE still had not completed its process of identifying the two Texas sites it intended to designate as potentially acceptable. Therefore, instead of clearly identifying the exact sites within the statutory time period, "DOE identified two potentially acceptable *locations* of about 190 and 300 square miles each." DOE Mission Plan, vol. II, at 117-18 (emphasis added).[2] For the

---

1. Three of the states—Louisiana, Nevada, and Washington—contain one potentially acceptable site each. Each of the other three states—Mississippi, Texas, and Utah—contain two such sites. Thus, DOE has designated nine potentially acceptable sites for the first repository. Seventeen additional states are under consideration for the second repository.

2. "Potentially acceptable location" is not an NWPA-defined term. "Location" was a term of art in DOE's pre-Act screening program which referred to the third stage of the narrowing process. The fourth (and final) stage—"site"—typically encompassed less than ten square miles. *See* DOE's Draft Environmental Assessment for Deaf Smith County Site, Texas, at 1-5—1-6 (Dec. 1984); *see also* Final Siting Guidelines, 49 Fed. Reg. at 47,715 (1984). In Texas, DOE has employed the phrase "potentially acceptable site" inconsistently, sometimes referring to the broader "locations" and sometimes to the nine-square-mile sites. Only the latter use is consistent with the Act and with DOE's use of the phrase in the other affected states.

purpose of comparing the nine potentially acceptable sites with one another, which Section 112 requires before the Secretary can nominate the five sites he deems suitable for site characterization, DOE had to narrow the Texas areas from location size to site size. 764 F.2d at 281. On November 27, 1984, DOE issued a three-volume final report entitled *Identification of Sites Within the Palo Duro Basin* ("Texas Site Identification Report" or "Report"). The Report was issued well over a year after the timely identification under Section 116(a) of the seven potentially acceptable sites in other states. Furthermore, it came out only three weeks before DOE indicated in a draft report that it would recommend one of the Texas sites to be among the three sites scheduled to undergo site characterization.

The Report constituted the Secretary's notice to Texas officials of his final determination of the exact identity of the two nine-square-mile Texas sites that DOE would compare with the other seven potentially acceptable sites to decide: (a) which five sites it would nominate; and (b) in turn, which three of these five sites it would recommend for site characterization activities under Section 113 of the NWPA. This action—the final determination of the exact identity of the potentially acceptable sites in Texas—is the one Texas challenges.

Court proceedings

Pursuant to Section 119(a)(1) of the Act, Texas promptly petitioned the Fifth Circuit for review of the Secretary's action embodied in the Texas Site Identification Report and of his inaction in failing to determine Texas' potentially acceptable sites in a timely manner. DOE filed a Motion to Dismiss, and the Fifth Circuit, without affording Texas the opportunity for oral argument, granted DOE's motion, holding that the challenged administrative action was not final and, alternatively, that it was not ripe for judicial review. Texas now seeks a reversal of the Fifth Circuit's decision and a remand for resolution of the merits of the controversy.

REASONS FOR GRANTING THE WRIT

I. The Determination of What Constitutes a Final Decision or Action under Section 119(a)(1)(A)-(C) of the Act Is an Important Question in the Administration of the High-Level Waste Program Upon Which This Court's Guidance Is Needed.

The question presented here is an important one to the federal government, the states, and the federal judiciary. It is important to the short- and long-term federal administration of the massive fifteen year program that will be "the nation's largest civil works project," *see* Crawford, *DOE, States Reheat Nuclear Waste Debate,* SCI., Oct. 11, 1985, at 150. It is important to the states, which during this highly intrusive and demanding program's implementation often will be confronted with deciding whether a legal challenge to a particular federal decision or action must be instituted immediately or, instead, should be deferred. And it is important to the judiciary, offering the Court its first opportunity to construe this long-needed federal statute, enacted to address a "national problem," NWPA § 111(a)(2), 42 U.S.C. § 10131(a)(2), implicating "major subjects of public concern," NWPA § 111(a)(7), 42 U.S.C. § 10131(a)(7). The opportunity should be seized, because the case presents a fundamental question about when the federal courts should become available to fulfill their assigned role of judicial review during the Act's implementation.

The Fifth Circuit's denial of judicial review of the Secretary's final site determinations for Texas ignores the plain meaning of Section 119(a)(1)(A) of the Act and DOE's own characterization of the challenged administrative action as a final one. In doing so, it undermines the states' statutory rights to employ judicial review periodically to check DOE's final decisions and actions when they veer from the legally prescribed course. A further consequence of leaving the Fifth Circuit's decision undisturbed may be that the crucial substantive decision at issue in this case will be insulated permanently from judicial review.[3]

---

3. The Fifth Circuit's decision is disturbingly ambiguous on this point. There are vague hints that the Fifth Circuit's decision was one on reviewability, although cloaked in the guise of finality and ripeness. This ambiguity,

(footnote continued on following page)

DOE has estimated that over the life span of the high-level waste program. encompassing both the first and second repositories. its cost will range from $20.9 billion to $35.3 billion. DOE Mission Plan, vol. 1, at 398. The estimated cost from construction to decommissioning of a repository in salt—the host rock for the Texas sites—is $6.8 billion. *Id.* at 395. As the implementation of the program moves from its early stages, the costs will increase. Thus, uncorrected legal or technical mistakes made early in the program will cost more and be more difficult to correct as the project moves into its later stages.

As the costs increase for correcting mistakes, DOE's reluctance to recognize them inevitably will increase, too. And if the states are forced to wait until the later stages of the program to avail themselves of their statutory right to judicial review of final DOE decisions and actions, the courts will be confronted with major difficulties in fulfilling their judicial review duties. First, the accretion of issues caused by deferral of their consideration may lead to confusion. Second, and more importantly from a practical viewpoint, the courts' resolution of mistakes made early in the process undoubtedly will be influenced by the prospect that, if DOE is found to have acted improperly, a substantial portion of the project may have to be redone at a cost of billions of dollars. Deferral thereby threatens the values of safety lying at the heart of the Act. Therefore, from a purely pragmative perspective, *see Abbott Laboratories v. Gardner,* 387 U.S. 136, 149 (1967) (finality of administrative action is interpreted pragmatically), if the Act's judicial review provisions (which specify direct circuit court review) permit it, early rather than late resolution of certain crucial issues is an important principle to establish under this Act.

(footnote continued from previous page)

when coupled with DOE's Fifth Circuit position that the challenged action is never judicially reviewable, provides an additional reason for granting this petition. It must be made clear that the action challenged here is judicially reviewable. *Cf. Lindahl v. Office of Personnel Management,* 105 S.Ct. 1620, 1627 (1985) (only clear and convincing evidence of Congressional intent to do so suffices to protect administrative action from judicial review). Nothing in the Act insulates final potentially acceptable site decisions from judicial review.

Of the crucial issues in the program's implementation which need early resolution, the legal ramifications of DOE's determination of the exact identity of sites subjected to detailed investigation and comparison with each other is perhaps the most important one. It is the first statutorily specified step that DOE was obligated to take, *see* NWPA § 116(a), 42 U.S.C. § 10136(a), and it is the first step that DOE indeed took.[4] The ability of the first repository to isolate its extremely dangerous contents for essentially an eternity from contact with the outside environment depends directly on the quality of the initial pool of sites—the nine potentially acceptable sites—from which DOE draws its ultimate choice. It is for this reason that DOE has called its identification of potentially acceptable sites a "principal decision point," *see* DOE Mission Plan, vol. II, at 122, in the high-level waste program.

The issue of whether and when potentially acceptable site determinations are reviewable under Section 119(a)(1) retains vitality beyond the selection process for the first repository. The two Texas sites likely will remain potentially acceptable sites for the second repository even if they are not recommended for the first one. DOE Mission Plan, vol. 1, at 54; *see also* NWPA § 112(b)(1)(C), 42 U.S.C. § 10132(b)(1)(C) (only sites nominated but not among the three recommended for site characterization for first repository are excluded from consideration for second repository). Thus, the pall cast over this prime Texas farmland will linger for a very long time. It will have concrete consequences in terms of depressed land values, disincentives to investment in the land to improve production, and psychological uncertainty for its private owners until at

---

4. Under Section 112(a) of the Act, DOE was to have promulgated siting guidelines for the recommendation of sites for repositories within the same 180 day period it was to have chosen potentially acceptable sites; however, these guidelines were not final until January 7, 1985—a year and a half after the deadline. *See* Final Siting Guidelines, 49 Fed. Reg. 47,714 (1984). Ten states and several environmental organizations have challenged their validity in litigation pending in the United States Court of Appeals for the Ninth Circuit. *See, e.g., Washington v. DOE,* No. 85-7128 (9th Cir. filed March 8, 1985). Pending in that court is a DOE Motion to Dismiss, which argues that the siting guidelines are neither a final action nor ripe for judicial review under Section 119(a)(1)(A) of the Act, despite their promulgation as final Administrative Procedure Act ("APA") rules.

least the end of 1991, DOE's current estimate of when site characterization recommendations for the second repository will be completed. DOE Mission Plan, vol. 1, at 69. Furthermore, the potentially acceptable site designations for the second repository have not yet been made. Therefore, for the seventeen additional states currently under consideration for the second repository, *see* n.1, *supra*, the issue presented here looms as an important one.

The high-level waste program is of national importance. It implicates concerns of safety, economics, *cf. Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 196 (1983), and federalism. The issue presented in this case touches upon all these concerns, plus the role the federal judiciary will play in carrying out the responsibilities Congress has given it through the NWPA. Now, in this early but crucial stage of the long program, is the appropriate time for the Court to provide guidance on the rules governing the affected parties.

II. The Fifth Circuit's Resolution of the Finality and Ripeness Issues Conflicts with Administrative Law Principles Established by This Court's Decisions.

The Fifth Circuit's holding that, regardless of the seeming finality of the Secretary's decision on two Texas sites, it is not final for purposes of judicial review, 764 F.2d at 282-83, cannot be squared either with the plain language of Section 119(a)(1)(A) of the NWPA or with principles established by this Court. That provision establishes for affected parties a right to judicial review of "*any* final decision or action of the Secretary...under this part[.]" NWPA § 119(a)(1)(A), 42 U.S.C. § 10139(a)(1)(A) (emphasis added).[5] The challenged site narrowing determination was made under the part of the Act to which Section 119(a)(1)(A) is expressly applicable. DOE repeatedly said that the determination was final. *See, e.g.*, November 27, 1984, letter from Donald Paul Hodel to Honorable Mark White (referring to "the final report"); 49 Fed.

---

5. Subsections 119(a)(1)(B) and 119(a)(1)(C) omit any reference to finality. Because their language reaches at least as far as subsection 119(a)(1)(A), the analysis in the text also applies to them, and they will not be treated separately.

Reg. at 47,716 (1984) (same); Texas Site Identification Report, vol. 3, at 99, 100, 101, and 102 (same). Thus, the conclusion that the challenged action was a final one under the NWPA for purposes of judicial review seems obvious.

The Fifth Circuit avoided this obvious conclusion by importing concepts of finality from the APA into the NWPA and concluding that judicial pragmatism dictated a conclusion that the challenged action was not final. Both parts of the Fifth Circuit's analysis are flawed.

First, finality under the APA for purposes of non-statutory judicial review is not necessarily the same as finality under statutes specifically providing for judicial review. *See, e.g., Natural Resources Defense Council, Inc. v. NRC*, 539 F.2d 824, 837 (2d Cir. 1976), *remanded for consideration of mootness*, 434 U.S. 1030 (1978). The validity of this principle is implicit in this Court's decision in *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 586-92 (1980), in which judicial review provision of the Clean Air Act was construed in light of the act's statutory scheme and legislative history, not of the APA's finality provisions.

Second, judicial pragmatism does not dictate a conclusion that the challenged decision is not final. As already explained, pragmatism counsels for review of a major statutory milestone in the program such as the designation of the pool of sites which will be subjected to further investigation so that the final site can be chosen. Judicial review at this stage makes sense, even if the stage is a relatively early one. In any event, the Court has explained the considerations that bound the pragmatic assessment:

> [T]he relevant considerations in determining finality are whether the process of administrative decision-making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action.

Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970); *see*

also Bell v. New Jersey, 461 U.S. 773, 780 (1983). Here, DOE's identification of the Texas sites was "a definitive statement of its position[.]" *Id.* It finally determined the rights and obligations of DOE and Texas by settling exactly which Texas sites are to receive more searching scrutiny, including especially the extensive scrutiny given them in the final versions of the statutory environmental assessments when they are issued. The pragmatic concept of finality is sufficiently realistic to include the situation presented here within its ambit.

Finally, the application of another finality principle established by the Court reveals the failure of the Fifth Circuit to follow guiding administrative law principles. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court explained that a "core principle" required that statutory finality provisions should be construed so that "crucial collateral claims" will not be left unreviewable. *Id.* at 331 n.11. Given the fact that DOE argues—and that the Fifth Circuit may be inclined to hold—that final potentially acceptable site decisions are not judicially reviewable at all, *see* n.3, *supra*, it is especially appropriate that the decision challenged by Texas be reviewed now. Otherwise, this crucial step in the high-level waste program may never be subjected to the judicial scrutiny Congress intended it to receive when sought by an affected party.

As an alternative to its finality holding, the Fifth Circuit determined that the challenged action was not ripe for judicial review. Ripeness determinations, however, are inapposite in cases such as this one where final agency action is challenged pursuant to statutory review provisions. *See, e.g., Harrison v. PPG Industries, Inc., supra* (Court did not undertake ripeness analysis in administrative challenge governed by judicial review provisions of Clean Air Act); *see also Western Oil and Gas Association v. EPA*, 633 F.2d 803, 807-08 (9thCir. 1980). A noted authority on federal courts has observed that on direct appellate court review of agency action "finality rules can serve all the purposes of avoiding premature interference [with agency action] that are served in other contexts by exhaustion and ripeness." 16 Wright, Miller, Cooper, & Gressman, *Federal Practice and Procedure: Jurisdiction*, § 3942, at 314-15 (1977). Thus, once the challenged decision is found to be a final one for judicial review purposes under Section 119(a)(1)(A) of the Act, there is no basis or need for engaging in an analysis of ripeness principles. They simply are inapplicable.

Even if ripeness principles were applicable, the consequences to Texas and to the high-level waste program of the Texas site designations are sufficiently concrete to make the issue ripe for review. A basic, common sense understanding of the impact of DOE's decision on the farmers whose land lies within the two nine-square-mile sites reveals that Texas is presenting the courts with much more than an abstract disagreement which the ripeness principle is meant to help the courts avoid, *see, e.g., Thomas v. Union Carbide Agricultural Products Co.*, 105 S.Ct. 3325, 3333 (1985). The psychological impact and the effect on land values is palpable. The issue of whether DOE properly identified the Texas sites and what Texas' remedy shall be if DOE acted improperly can get no riper than it is now. The time is right for the issue to be reviewed by the courts as Congress contemplated when it gave the courts the power (and duty) of judicial review in the NWPA's Section 119(a)(1)(A).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted and its judgment vacated.

Respectfully submitted,
JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

NANCY N. LYNCH
Assistant Attorney General
Chief, Environmental
Protection Division

RENEA HICKS*
Assistant Attorney General

P.O. Box 12548
Austin, Texas 78711
(512) 475-1101

Attorneys for Petitioner

October 1985

**Counsel of Record*

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4826

STATE OF TEXAS,
DELBERT L. DEVIN, ET AL,

Petitioners,

versus

UNITED STATES DEPARTMENT
OF ENERGY, and DONALD PAUL
HODEL, Secretary, United States
Department of Energy,

Respondent.

Petition for Review of an Order of the
United States Department of Energy

(June 19, 1985)

Before REAVLEY, POLITZ and HIGGINBOTHAM, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

On December 19, 1984 the State of Texas and several of its citizens filed petitions in this court challenging certain actions taken by the Secretary of Energy under the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 *et seq.* The petitions sought review of the Secretary's designation of two sites in Texas as potentially acceptable for development as nuclear waste repositories under the NWPA. The Secretary asks us to dismiss the petition, contending that the challenged actions are neither final under the Act nor ripe for review. We agree with the Secretary and grant the motion to dismiss.

I

The Nuclear Waste Policy Act is designed to achieve a permanent and workable solution to the mounting problem of disposal of high-level radioactive wastes in the United States. The Act establishes an ongoing process by which the Secretary of Energy, acting within carefully defined time frames, is to select a number of sites potentially suitable for development as nuclear waste disposal facilities, and after a winnowing process in which the sites are evaluated not only by the Secretary, but also by the President, Congress, and the affected states, is to develop one of the sites into an operational waste repository by the year 1998. We will not here attempt a comprehensive explication of the NWPA's statutory scheme, but a brief description of the site selection process is necessary to put in context the actions challenged by Texas.

-1-

The NWPA, effective as of January 7, 1983, requires the Secretary to identify states containing "potentially acceptable sites"[1] for the first repository within 90 days of that date. § 116(a), 42 U.S.C. § 10136(a). Within 90 days of identification, the Secretary must notify the governors and legislatures of such states of the location of such potentially acceptable sites. *Ibid.* During this same 180 day period, the Secretary is to promulgate general guidelines for the recommendation of sites for repositories. These guidelines are to address specific considerations that Congress deemed pertinent to the site selection process, as well as those the Secretary finds appropriate. § 112(a), 42 U.S.C. § 10132(a).

Once the guidelines are promulgated, the Secretary is to use them to determine which of the sites designated by him are suitable for "site characterization"—i.e. further intensive testing—and he is to nominate five sites as suitable for site

---

1. The term "potentially acceptable site" means

> any site at which, after geologic studies and field mapping but before detailed geologic data gathering, the Department undertakes preliminary drilling and geophysical testing for the definition of site location.

§ 116(a), 42 U.S.C. § 10136(a).

characterization.[2] § 112(b)(1)(4), 42 U.S.C. § 10132(b)(1)(A). This nomination must be preceded by public comment and hearings, § 112(b)(2), 42 U.S.C. § 10132(b)(2), and must be accompanied by an "environmental assessment." § 112(b)(1)(E), 42 U.S.C. § 10132(b)(1)(E). This environmental assessment is a comprehensive document that discusses the suitability of the nominated site for characterization and development as a repository and compares its suitability with the other four nominated sites. The environmental assessments are expressly labelled by the statute as "final agency action" and are subject to judicial review. *See* §§ 112(b)(1)(F)(i), 119(a)(1)(E), 42 U.S.C. §§ 10132(b)(1)(F)(i), 10139(a)(1)(E).

From these five nominated sites the Secretary is to recommend three sites to the President for site characterization, and the President must review and approve this recommendation. § 112(c), 42 U.S.C. § 10132(c). Following site characterization, the President is to recommend one of the three sites to Congress for development as the first repository, § 114, 42 U.S.C. § 10134. An affected state or Indian tribe may submit to Congress a notice of disapproval of the President's recommendation, *see* §§ 116(b)(2), 118(a), 42 U.S.C. §§ 10136(b)(2), 10138(a), and this veto prohibits the President's recommendation from becoming effective unless both houses of Congress override it by passing a resolution of repository siting approval within 90 days. § 115(c), 42 U.S.C. § 10135(c).

The action challenged here occurred at the very first stage of the Secretary's site selection process under the NWPA—his identification of "potentially acceptable sites" for the first repository. The short time period Congress allotted the Secretary for this step—a maximum of 180 days—was no accident. This brief period reflected the fact that prior to passage of the NWPA, DOE had already identified seven potentially acceptable sites in states other than Texas, and, in Texas, had

---

2. Site characterization is an involved process that involves not only the sinking of shafts at the candidate sites, but also onsite testing with radioactive material. *See* § 113, 42 U.S.C. § 10133.

substantially completed identification of two sites. This site screening work had been under way for a number of years prior to passage of the NWPA, and the Act used that work as a springboard into the site nomination process.

Because the sites in states other than Texas had already been identified, the Secretary was able to issue on time the notifications to those states required by section 116. The screening process for the Texas sites was not yet complete when the 180 day period expired, however; thus, the notification given to Texas in February 1983 was that there were "two locations" in the Palo Duro Basin of the Texas Panhandle that the Secretary believed contained "one or more potentially acceptable sites." The areas of the Panhandle that were being evaluated covered hundreds of square miles and could not readily be compared to the potential sites identified in other states, which were each roughly ten square miles in area. Such comparisons were to be determinative of the Secretary's decision on which potentially acceptable sites to nominate under section 112 as suitable for site characterization; accordingly, the Secretary continued screening the potential sites in Texas.

By February 1984 the Secretary had tentatively identified two nine-square-mile sites in the Palo Duro Basin, and published his conclusions in the form of a draft report in March 1984. Texas and some of the individual petitioners commented on this draft, with the result that the Secretary shifted the location of the sites by about two miles in each case. In November 1984 the Secretary issued a report entitled *Identification of Sites Within the Palo Duro Basin* that notified Texas of the finalized location of the potentially acceptable sites in the Panhandle. It is this action—the Secretary's completion of the site screening process in Texas—that the State invites us to review.

II

Texas contends that section 119(a)(1)(A) of the NWPA, 42 U.S.C. 10139(a)(1)(A), which gives the courts of appeal jurisdiction to review "any final decision or action of the Secretary," provides a basis for the review it seeks. The State points out that the Secretary's site screening process in Texas is

complete—i.e. he has chosen two nine mile sites in Texas as potentially acceptable for repositories under the NWPA from among the hundreds of square miles in the Panhandle previously under his consideration. Therefore, the State argues, this action is reviewable under the plain terms of section 119(a)(1)(A).

The Secretary agrees that the two areas designated in his November 1984 report are the only Texas sites that will possibly be nominated by him for the first repository; indeed he acknowledges that the screening of the large areas first identified in Texas, so as to narrow the location of potential sites to a size comparable to sites in other states, was necessary if any sites in Texas were to be nominated as suitable for site characterization under section 112(b)(1)(A). But the Secretary vigorously disputes Texas' conclusion that his actions are "final" within the meaning of section 119(a)(1)(A). He explains that his selection of these two particular sites from among others in the Panhandle as acceptable for further evaluation is only a preliminary but necessary step in the nomination process. Until he makes his *nominations* under section 112, the Secretary argues, the suitability of potential sites is a matter for his discretion. Once nomination occurs and environmental assessments are prepared for the selected sites, judicial review, as well as other public and governmental scrutiny of the siting decisions, is expressly provided for by the NWPA. This statutory scheme, the Secretary contends, demonstrates that the preliminary siting choices challenged here should not be considered "final" for purposes of judicial review under section 119(a)(1).

We think the Secretary's point is well taken. Courts interpret "finality," as that concept is used in the Administrative Procedure Act, in a "pragmatic way," *Pennzoil Co. v. FERC*, 645 F.2d 394, 399 (5th Cir. 1981), and that approach is appropriate here as well. Despite the seeming "finality" of the Secretary's decision to narrow the proposed repository sites in Texas to two areas of a size suitable for site characterization, when viewed in the context of the statutory scheme of the NWPA, the action is not final for purposes of our review.

As the Secretary explains in his motion to dismiss:

> Section 112 was carefully designed by Congress to lead to the Secretary's nomination of five sites suitable for site characterization, and the subsequent recommendation to the President of three sites for actual characterization as candidate sites. Congress determined the level of environmental review necessary at these stages by providing that "[e]ach nomination of a site under this subsection shall be accompanied by an environmental assessment," 42 U.S.C. 10132(b)(1)(E), and then providing that the environmental assessments would be "final agency action" subject to judicial review within the meaning of Section 119 and the APA. 42 U.S.C. 10132(b)(1)(F).

The Secretary contends that implicit in Congress' provision for such review is a determination that activities leading up to that point are neither final nor reviewable. While we are aware that a statute's express provision for review of certain agency actions does not necessarily negate the availability of review for other acts, *see Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967), the provision for review of environmental assessments does give us pause.

If the merits of the Secretary's decision on the Texas sites will be comprehensively evaluated in the environmental assessments should he determine that either or both sites are suitable for site characterization and nominate them under section 112(b)(1), and if the environmental assessments are themselves subject to judicial review, we see little point in reviewing his preliminary siting decisions now. The time frame within which these decisions are being made highlights our concern: the Secretary is presently trying to determine which of the sites that have been screened in a number of states are suitable for nomination under section 112(b)(1). Should he decide not to nominate either Texas site our review would have served little purpose, and if either is nominated, review will swiftly follow. We limit judicial review to "final" actions in an effort to avoid needless interruption of the administrative process. Were we to interpret "finality" here so generously as Texas suggests, the only certain result would be a waste of both

judicial resources and the time of all concerned. Surely such was not the intent of Congress in section 119(a)(1)(A).

-2-

Texas argues, however, that delay of review is not all that it seeks to avoid by petitioning at this juncture. At least part of the review it seeks here, the State suggests, would not be possible upon later review of the environmental assessments. Specifically, Texas contends that the Secretary should have screened the Texas sites under the guidelines he was required to promulgate under section 112(a) of the NWPA, and that because the issuance of those guidelines did not precede the screening process in Texas, the Secretary's selections cannot stand. This procedural attack on the Secretary's screening process cannot be made upon review of the environmental assessments,[3] and if we deny review now, Texas argues, the point will be irretrievably lost.

We are not persuaded. The guidelines that Texas contends restricted the Secretary's choices in site screening for the first repository simply have no application to that process. None of the sites selected in other states were chosen against the backdrop of such guidelines, and the happenstance that site selections in Texas were not complete when the NWPA took effect does not entitle Texas to different treatment. Indeed the short time limits imposed on the Secretary for notifying states with potentially acceptable sites and for identifying sites within the states suggest that this process was one subject to the agency's broad discretion. As described above, the deadlines for promulgating the section 112(a) guidelines and the deadline for making the section 116(a) site notifications were one and the same; with the time frame so arranged, it is difficult to imagine that Congress intended these guidelines to govern the initial site screening process. That the Secretary was unable to meet either deadline does not alter the degree of discretion given

3. Section 112(b)(1)(F) limits judicial review of the environmental assessments to the factors enumerated in § 112(b)(1)(E)(i)-(vi). Although these factors permit review of the environmental assessment on all pertinent issues, the procedural formalities which attend the preliminary site screening process are not among them.

him for this particular decision.[4] Since the section 112(a) guidelines were inapplicable to the decision that Texas challenges here, even if we decline the State's invitation for review now, we will not preclude any attack on the Secretary's decision that will not be available upon later review.

III

Even assuming that the Secretary's preliminary siting decisions challenged here are "final" within the meaning of section 119(a)(1)(A), that action is nevertheless not "ripe" for our review. We have long imposed a ripeness requirement even where the statute authorizing our review did not do so, *see, e.g., Pennzoil Co. v. FERC,* 742 F.2d 242, 244 (5th Cir. 1984), and such a requirement is appropriate here.

The doctrine of ripeness, first announced by the Court's decision in *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967), requires us to evaluate both "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. Four factors are relevant: (1) whether the issues presented are purely legal; (2) whether the challenged agency action constitutes "final agency action" within the meaning of the APA; (3) whether the challenged action has or will have a direct and immediate impact on the petitioner; and (4) whether resolution of the issues will foster, rather than impede, effective enforcement and administration by the agency. *Id.* at 149-54; *Pennzoil,* 742 F.2d at 244. Assuming for the sake of argument that the challenged action is "final," none of the other criteria necessary for ripeness are met here.

-1-

First, the issues before us are not purely legal. Texas suggests that this requirement is met because the factual record supporting the Secretary's action is complete, *see, e.g., Mississippi Valley Gas Co. v. FERC,* 659 F.2d 488, 498 (5th

4. The Secretary does not dispute that he issued neither the § 112(a) guidelines nor his final decision on the Texas sites within 180 days of January 7, 1983. As explained above, however, the Secretary did notify Texas within this time limit that there were one or more potentially acceptable sites within the large area of the Panhandle he was then evaluating.

Cir. 1981), but we think that this factor entails something more. It expresses the reviewing court's need for a completed and specific framework within which the agency's decision can properly be evaluated, and such a framework is absent here. Otherwise stated, judicial review of the Secretary's site screening process will be more meaningful if we require Texas to wait until environmental assessments are prepared. Such documents and the framework they provide for our review, *see* § 112(b)(1)(E), 42 U.S.C. § 10132(b)(1)(E); *supra* n.3, make our task more manageable and permit both us and the parties to focus on the concerns in repository site selection that Congress deemed important. Were we to attempt to review the Secretary's decision at this point, we would have little or no source of guidance for our decision. We eschew such judicial dead-reckoning where we can avoid it.

-2-

Nor do we think the Secretary's decision here has the requisite direct and immediate impact on the petitioners. Texas and its interested citizens can attack the Secretary's decision *now* by bringing complaints directly to him through the public hearing process of section 112(b)(2).[5] That section requires the Secretary to hold public hearings in the vicinity of any site that is subject to nomination under section 112(b)(1)(A), so that the public may voice their concerns about the choice. If the chosen sites are in fact unsuitable for characterization and ultimate development as repositories, Texas and the affected citizens may yet convince the Secretary that this is so before he decides which sites to nominate. At the least, the public can use the hearings to apprise him of particular issues they wish to see addressed in the environmental assessments if the proposed

---

5. Section 112(b)(2) provides:

> Before nominating any site the Secretary shall hold public hearings in the vicinity of such site to inform the residents of the area in which such site is located of the proposed nomination of such site and to receive their comments. At such hearings, the Secretary shall also solicit and receive any recommendations of such residents with respect to issues that should be addressed in the environmental assessment described in paragraph (1) and the site characterization plan described in section 10133(b)(1) of this title.

sites are nominated.[6] The hardship that participation in this ongoing process may impose on Texas and its citizens is not sufficient to meet the requirement that they sustain a "direct and immediate impact" from the Secretary's action. *See F.T.C. v. Standard Oil Co.*, 449 U.S. 232, 244 (1980).[7]

-3-

Moreover, judicial review at this juncture would likely interfere with the administrative process underway with respect to the Texas sites at issue. If we allow Texas to bring its case before us now, we encourage it to forego its opportunities before the Secretary described above. If we deny the review requested here as premature, however, we further Congress' intent that the public hearing and comment forum, rather than the courts, be the focus of review at this point in the site selection process.

Relatedly, the environmental assessment process is not the only means of review of the Secretary's siting decision. The statute contemplates repeated review of the Secretary's action by the President, *see* § 112(c), 42 U.S.C. § 10132(c), the Congress, *see* §§ 114(a)(2)(A), 115, 42 U.S.C. §§ 10134(a)(2)(A), 10135 and the states, *see* § 116(b), 42 U.S.C. § 10136(b). We recognize that this step by step review process of the NWPA is intentionally repetitive and designed to assure that no site be chosen that is not safe for use as a repository, but in the face of so many planned opportunities for review, we are reluctant to imply more from the general language of section 119(a)(1)(A). The review procedures expressly provided were carefully planned with the statutory time frame in mind so that the ultimate goal of the NWPA, a working repository by the year

---

6. Should the Secretary nominate either site and fail to address the concerns raised in the hearings, his environmental assessment may be attacked as deficient on that ground when it is reviewed under section 119(a)(1)(E).

7. The private petitioners also complain that they are suffering from the effect of the Secretary's decision *now* because, for example, land values in the designated areas have fallen due to their designation by the Secretary as "potentially acceptable sites" for the first repository. This circumstance, however, may be only temporary, because the Secretary has not yet decided which sites to *nominate* under Section 112. Only after nomination will the effects of the Secretary's decision be permanent, and at that point the NWPA expressly authorizes our review.

1998, could be achieved. Unnecessary judicial review will undoubtedly impede the Secretary's ability to meet that goal.

IV

In sum, we conclude that the Secretary's preliminary siting decisions challenged here by Texas and the private petitioners are not "final actions" which are ripe for our review. When considered in the context of the statutory scheme of the NWPA, these decisions are but a preliminary step to actions that will later be reviewable by this court. Review at this point would entail a waste of judicial and administrative resources, would be difficult to conduct in any event for lack of a meaningful framework within which such review may go forward, and would detract from the public review process currently in progress. All these considerations suggest that the Secretary's siting decisions challenged here are neither "final" nor "ripe" for judicial review. Accordingly, we grant the Secretary's motion to dismiss.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4826

STATE OF TEXAS, DELBERT L. DEVIN, ET AL.,
Petitioners,

versus

UNITED STATES DEPARTMENT OF ENERGY and
DONALD PAUL HODEL, Secretary, United States
Department of Energy,

Respondents.

Petitions for Review of an Order of the
Department of Energy

ON PETITIONS FOR REHEARING AND SUGGESTIONS
FOR REHEARING EN BANC

(Opinion June 19, 5 Cir., 1985, _____F.2d_____)

(July 31, 1985)

Before REAVLEY, POLITZ and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham

United States Circuit Judge

REHG-7